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Please reply to COLIN BLACK ANDREWS
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December 16, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Notice of Ex Parte Presentation**

Policies Regarding Mobile Spectrum Holdings, Docket No. 12-269

Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel in the UHF Television Band for Use by White Space Devices and Wireless Microphones, MB Docket No. 15-146

Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auction 1001 and 1002, AU Docket No. 14-252

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is submitted on behalf of Free Access & Broadcast Telemedia, LLC ("FAB") to provide notification for the record that on December 16, 2015, David J. Mallof, principal of FAB, together with the undersigned counsel, met with Edward "Smitty" Smith, Legal Advisor, in the Office of Chairman Tom Wheeler.

The meeting was scheduled prior to the FCC's addition to its December Meeting Agenda the Third Report and Order, concerning the impact of incentive auction displacement to Low Power Television ("LPTV") stations. In order to comply with Section 1.1203 of the



Commission's rules prohibiting presentations on materials listed on the Commission's Sunshine Agenda, the upcoming Third Report and Order was not discussed at the meeting.

During the meeting, we discussed the Chairman's November 16, 2015 response letter to Representative Ellmers' October 22, 2015 letter, specifically with regard to the lack of any statistical analysis to the adverse impacts on LPTV. We also expressed concern with how LPTV station's rights were obstructed in the First Report and Order, and requested an update on the FCC's response to the joint Congressional letter to the Government Accountability Office requesting further analysis of impacts to LPTV.

The written materials distributed at this meeting are attached for inclusion in the record. If you have any questions about this submission, please contact the undersigned.

Sincerely,

Colin Black Andrews

Counsel to Free Access & Broadcast Telemedia, LLC

cc: Edward Smith, Legal Advisor, Office of Chairman Wheeler (edward.smith@fcc.gov)
Gary Epstein, Chair, Incentive Auction Task Force (gary.epstein@fcc.gov)
Howard Symons, Vice-Chair, Incentive Auction Task Force (howard.symons@fcc.gov)
William T. Lake, Media Bureau Chief (william.lake@fcc.gov)
Barbara Kreisman, Media Bureau (barbara.kreisman@fcc.gov)
Thomas Reed, OCBO Director (thomas.reed@fcc.gov)
James W. Wiley, III, IATF Legal Advisor (james.wiley@fcc.gov)

Encl.:

- Attachment A – Letter from Representatives Ellmers, Cramer, Bilirakis and Long to the Honorable Tom Wheeler (Oct. 22, 2015)
- Attachment B – Letter from FCC Chairman Tom Wheeler to Representative Gus Bilirakis (Nov. 16, 2015)
- Attachment C – Letter from Representatives Eshoo and Barton to the GAO, October 1, 2014.
- Attachment D – *RBR-TVBR* op-ed article entitled “*The March 29, 2016 Start Date for the Spectrum Auction: A Date Set in Foam,*” dated November 23, 2015.

Attachment A

Congress of the United States
House of Representatives
Washington, DC 20515-3302

October 22, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, Docket No. 12-268, and

Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power TV and Translator Stations, Docket No. 03-185

Dear Mr. Chairman:

We write to applaud your efforts to achieve a successful Spectrum Incentive Auction. As supporters of the Middle Class Tax Relief and Job Creation Act ("Spectrum Act"), it is our view that a successful auction must make an effort to accommodate Low-Power Television ("LPTV") stations and translators so they may continue to serve their communities, whether urban, suburban, or rural.

As our colleagues Representatives Greg Walden and Joe Barton reminded you in a letter on August 4th, Congress and the FCC agree on the importance of community-based LPTV and translators. LPTV and translators provide the public with a diverse selection of programming and content representing many different cultures, denominations, and worldviews.

Following our July 28, 2015 oversight hearing, we are concerned that following the FCC's broadcast incentive auction there may not be sufficient spectrum to accommodate LPTV stations and translators, potentially forcing them to cease operation.

In order to retain as many of these valuable voices in our communities, it is essential that the FCC limit the incentive auction's impact on LPTV service as much as possible without harming the goals of the incentive auction or delaying its progress.

By November 18, 2015, I would like you to provide us with the following:


1. A detailed status of the Commission's open rulemaking on considering additional means to mitigate the potential impact of the incentive auction and the repacking process on


LPTV and TV translator stations to help preserve the important services they provide (Docket No. 03-185 and No. 12-268), specifically addressing whether this rulemaking will be completed well before auction.

2. In addition, we would also appreciate if you provided whatever analyses and studies that have been conducted by your staff and consultants on the impacts on possible stranding or effective extinguishment of LPTV stations in an auction that clears 126 MHz in the reverse stage and sells 100MHz in the tandem forward event nationwide in all markets, as your staff and investment banking agents have been marketing. Please provide these forecasted LPTV clearing effects by TV market.
3. Lastly, we would also like you to release any alternate scenarios already in-hand that provide ranges of impacts upon LPTV for clearing down to 84 MHz and up also up to 132 MHz of spectrum, as have appeared in various FCC public statements as possible auction goals and outcomes.

We look forward to your response.

Sincerely,


Renee Elmers (R-NC)
Member of Congress


Kevin Cramer (R-ND)
Member of Congress


Gus M. Bilirakis (R-FL)
Member of Congress


Billy Long (R-MO)
Member of Congress

cc: Hon. Mignon Clyburn, FCC Commissioner
Hon. Michael O'Rielly, FCC Commissioner
Hon. Ajit Pai, FCC Commissioner
Hon. Jessica Rosenworcel, FCC Commissioner

Attachment B



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 16, 2015

The Honorable Gus Bilirakis
U.S. House of Representatives
2112 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Bilirakis:

Thank you for your letter concerning the impact of the upcoming auction on low power TV stations and translators. I agree that LPTV stations and TV translators provide important services upon which many consumers and businesses in rural communities rely. Although the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act") does not explicitly protect LPTV and TV translator stations in the repacking process, the Commission is taking an array of steps to help mitigate the impact of the auction and repacking process on LPTV and TV translator stations so that the important programming content they provide continues to reach viewers.

As an initial matter, the Commission last year announced that it will open a special filing window for operating LPTV and TV translator stations that are displaced by the repacking and reallocation of the television bands, in order to offer such stations an opportunity to select a new channel.¹ We also modified our rules to allow stations with mutually exclusive displacement applications to reach a settlement or an engineering solution, rather than require competing stations to resolve all mutual exclusivity through an auction as the Communications Act generally requires.² In cases where a settlement is not possible, in order to ensure the continued availability of full power television service, we afforded priority to displacement applications filed by digital replacement translators used to fill in the service areas of full power stations that could not otherwise be replicated when those stations transitioned from analog to digital facilities.³

Additionally, to help accommodate some of the needs of LPTV and translator stations following the auction, the Commission adopted rules that will permit these stations to remain on their existing channels during the post-auction transition period until they are notified that a forward auction winner is within 120 days of commencing operations on the repurposed 600 MHz spectrum.⁴ For many LPTV and translator stations that are located in the new 600 MHz Band, this could mean continued operations for many years until wireless licensees commence operations.

¹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GH Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6834-35, para. 657 (2014) ("*Incentive Auction Report & Order*").

² *Id.*, para. 661.

³ *Id.*

⁴ *Id.*, para. 661.

Recognizing the importance of LPTV and TV translator stations, the Commission also opened a dedicated proceeding to consider additional means to mitigate the potential impact of the incentive auction and the repacking process on LPTV and TV translator stations to help preserve the important services they provide.⁵ Today, I circulated proposed rules to my fellow commissioners and I expect that the Commission will act on the proposals put forward in this proceeding later this fall. Those proposals include a range of options to help enable LPTV and TV translator stations remain on the air. First, we have proposed extending the digital transition date for LPTV and TV translator stations until 12 months following the completion of the 39-month post-incentive auction transition period. This extension would prevent stations from having to upgrade facilities to meet the digital transition deadline before knowing whether the station would be displaced by the auction repacking process. Second, we have proposed allowing channel sharing by and between LPTV and TV translator stations.

Channel sharing arrangements could mitigate the effects of repacking displacement by allowing stations to share the remaining television channels and will facilitate the continued viability of LPTV through new programming and business arrangements that promote spectral efficiency.⁶ Third, in response to concerns that finding a new channel for displaced LPTV and TV translator stations will be challenging, we have also proposed to use our auction optimization and repacking software to assist LPTV and TV translator stations identify available channels and potentially maximize the number of such stations in the TV band post-auction.⁷ Of course, a station's decision to seek channel assignments recommended by the optimization software would be completely voluntary, but I believe that the use of our software will expedite and ease the post-auction transition process for many LPTV and TV translator stations.

The auction will by definition result in a smaller TV band and, therefore, fewer channels for all television stations – full power as well as LPTV and TV translator stations. The Commission has recognized that the auction will potentially displace a significant number of LPTV stations.⁸ However, in light of Congress's determination not to include LPTV or TV translator stations in the auction or protect them in repacking, we have not systematically analyzed the potential displacement impact on those stations. Similarly, because LPTV and TV translator stations are not entitled to protection in the repacking process, no assumptions regarding them are necessary to conduct auction simulations or repacking analyses; LPTV and TV translator stations do not factor into such analyses.

Since Congress enacted the Spectrum Act, the FCC has sought to faithfully implement its mandate, while mitigating the potential impact on broadcaster and other services that currently use the broadcast band, including LPTV and TV translator stations. I am confident that the steps

⁵ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, MB Docket NO. 03-185, Third Notice of Proposed Rulemaking, FCC 14-151 (rel. Oct. 10, 2014) ("*LPTV NPRM*").

⁶ *LPTV NPRM*, para. 14.

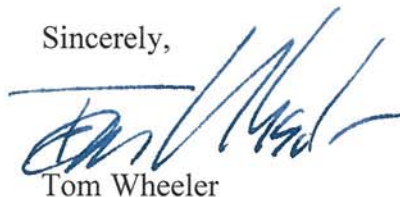
⁷ *Id.*, para. 44 et seq.

⁸ Incentive Auction Report and Order, 29 FCC Rcd at 6834-35, paras. 656-57.

Page 3—The Honorable Gus Bilirakis

I have described above will help ensure the continued availability of LPTV and TV translator services post-auction.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", with a horizontal line drawn above it.

Tom Wheeler

Attachment C

Congress of the United States

Washington, DC 20515

October 1, 2014

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro,

The Middle Class Tax Relief and Job Creation Act of 2012 became law in February 2012. This law directs the Federal Communications Commission (FCC) to conduct an incentive auction allowing a broadcaster to voluntarily relinquish some or all of their spectrum usage rights in return for compensation (better known as the “reverse auction”).¹ The law also requires the FCC to hold a “forward auction” allowing wireless carriers to bid on the available cleared spectrum.² Only full-power broadcasters and low-power broadcasters with a Class A license are able to participate in the reverse auction.

In May 2014, the FCC adopted an Incentive Auction Report and Order addressing important issues related to the incentive auction.³ The FCC also announced that the agency is planning to initiate a future Low-Power Television station (LPTV) and TV Translator station proceeding to consider measures that help alleviate the impact of LPTV and TV Translators during the incentive auction.

While we are thankful for the ongoing efforts of the FCC, we ask the Government Accountability Office (GAO) to study the impacts of the incentive auction on LPTV stations and TV Translator stations, as well as their viewers. Consistent with the FCC’s Report and Order, we ask that the GAO evaluate the impact of the incentive auction for each of the two potential scenarios for repurposing broadcast spectrum: (a) 84 megahertz and (b) 126 megahertz. Within each of the two categories, please provide the following information:

1. The total number of LPTV stations that provide original programming or broadcast local news and information, especially those serving racial and ethnic minority communities;
2. The total number of TV translator stations that rebroadcast local news and information programming of a full-power TV broadcast station;
3. A projection of the number of LPTV stations and TV translator stations listed under (1) and (2) that may lose either their current input or output channel as a result of the forward auction;

¹ Middle Class Tax Relief and Job Creation Act of 2012, 26 U.S.C. §6403 (2012).

² *Id.*

³ Federal Communications Commission. (2014). FCC adopts rules for first ever incentive auction; will make available additional airwaves, increase competition for mobile broadband [Press Release]. Retrieved from https://apps.fcc.gov/edocs_public/attachmatch/DOC-327100A1.pdf

4. A projection of the number of such LPTV stations and TV translator stations that will subsequently be able to locate and operate on replacement channels after the auction, together with an aggregate estimate of the costs of relocation, including new equipment, legal and engineering services, and facility construction;
5. A projection of the number of such LPTV stations and TV translator stations that will be unable to locate to or operate on replacement channels after the auction;
6. A projection of the number of viewers that will lose over-the-air access to at least one such local LPTV station that provide local news and information, especially to underserved communities of interest;
7. A projection of the number of viewers that will lose over-the-air access via such TV translator stations to at least one of the signals of the regional affiliates of the major commercial or noncommercial educational television broadcast networks; and
8. Recommendations to the FCC and Congress on ways to remedy adverse impacts of the auction on LPTV stations and TV translator stations, and, most importantly, their viewers.

Thank you for your timely attention to this request. If you have any questions, please contact Emmanuel Guillory (Rep. Joe Barton) at 202-225-2002 or David Grossman (Rep. Anna Eshoo) at 202-225-8104.

Sincerely,



Joe Barton
Chairman Emeritus
House Committee on Energy and Commerce



Anna G. Eshoo
Ranking Member
Subcommittee on Communications
& Technology

Attachment D

The March 29, 2016 Start Date for the Spectrum Auction: A Date Set in Foam

As appeared in **RBR-TVBR** November 23, 2015
<http://rbr.com/march-29-spectrum-auction-start-date-is-set-in-foam/>

Op-Ed by D.A. Selby*

The broadcast incentive auction is scheduled to kick off at the end of the first quarter of 2016. If all goes well, there will be reason for celebration for the broadcast and wireless communities and for the American public.

But will the FCC “screw the pooch,” as the Mercury astronauts used to say? This is quite possible, primarily via the FCC’s plan to shut down or marginalize some broadcasters who hold FCC licenses.

Here is the bottom line for broadcasters: Many stations might submit applications to the FCC during the December 8th to January 12th period expressing interest in participating in a possible reverse auction. But during the December to March period, all broadcasters should *insist* that the FCC give written assurance that the licensing process is not rigged to the detriment of licensed LPTV and translator stations.

The FCC must assure its stakeholders that its planned auction does not overcommit spectrum beyond the bounds of the necessary analysis – that apparently has not been conducted. Otherwise it is hard to imagine how the desired outcomes of the auction will ever be realized. In the end, the boards of directors and stockholders of private and public broadcast stations should not proceed into the auction room given the current stakes if the FCC gets it wrong.

FCC Chairman Tom Wheeler is apparently focusing on only the first hurdle in what is really an Olympian hurdling event. Clearing the initial reverse auction hurdle may well land the FCC flat on its face, if its stride is not right to commence the forward auction and then clear the final licensing leap.

A major issue is the FCC’s looming proposal to hand out free beachfront property in every DMA to Google and Microsoft. Besides being an act of piracy against broadcast’s already diminished spectrum, it would be a breach of Section 309(j)(1) of the Communications Act and a breach of the FCC’s fiduciary duty to the American public to treat these conglomerates as bidders, rather than as crony corporate welfare recipients.

And even if the FCC backs off this dubious policy, it will have yet another major hurdle to overcome – abused and outraged community-based low power television broadcasters holding 4,400 licensed stations that dwarf the 1,700 stations invited into the auction room.

In the auction as currently structured, many LPTV stations will likely be annihilated outright, especially [in the top 30 DMAs where 54% of the U.S. population resides](#). Despite over a year and a half of modeling analysis and entreaties for information from affected parties, the FCC continues to refuse to disclose the likely scope of the looming wipeout.

Many LPTV stations will be forced to pay for the “privilege” of moving to a new channel, if one can even be found after the favored carriers take licenses from incumbent broadcasters. Relocating is a daunting expense for operating LPTVs. [As a point of reference, LPTVs previously paid to move eight years ago after the last auction when there was still spectrum for all to find new channels.]

Like all FCC licensees, LPTVs are going concerns that expect to continue to operate. In short, they have rights.

And they have support in high places. Leading members of Congress who had a hand in writing the auction legislation have informed the FCC that bulldozing LPTVs and TV translators was never part of the plan.

On November 16th, Chairman Wheeler responded to four US House of Representative members led by Rep. Renee Ellmers (R-NC). They had asked the Chairman to report back on LPTV impacts the Commission envisioned based on the robust auction modeling scenarios the agency prepared with great precision over a period of 18 months.

Mr. Wheeler told Congresswoman Ellmers that the FCC had no modeling whatsoever incorporating LPTV. However, in order to meet its target of cleared television spectrum, surely the FCC has a precise idea of the impacts LPTV will suffer, if not economically, then certainly in terms of lost spectrum “cleared” in each of 210 DMAs which the Commission admits have been extensively modeled. It is impossible to believe that in structuring and promoting the auction, the FCC does not have this analysis.

Failure to consider and disclose how the small companies operating LPTVs will be impacted is in violation of the Regulatory Flexibility Act of 1980, which requires a study of any economic impact on small businesses caused by a new body of regulation. This violation has been brought to the attention of the DC Circuit Court of Appeals, where a lawsuit has been filed.

We have to wonder if the FCC will allow the past to be prologue when it comes to the incentive auction.

As a case in point, in the 1990s, the FCC attempted to roll over financially troubled NextWave in a spectrum proceeding, reselling bandwidth NextWave had won at auction and ignoring the fact that the company was in federal court under bankruptcy protection. The Commission was rebuffed in [a case that went all the way to the US Supreme Court](#). Wireless companies like Verizon had billions in capital tied up in deposits at the US Treasury. Benefits the American people might have enjoyed from the spectrum sale were greatly diminished by [the FCC's headlong rush to license new spectrum rights that were not "clean" to resell](#).

The stakes are very high. The FCC needs to get this right. It should scrap the unlicensed spectrum-grab plan and treat LPTV and TV translator stations in a fair and equitable manner.

FCC Commissioner Ajit Pai has warned that it is far more important to get the auction right than to hew to an artificial deadline. Chairman Wheeler's rush to start the auction will cast a massive shadow of doubt not only over broadcasters that relinquish spectrum and wireless companies that seek to invest in spectrum, but also over broadcast viewers, advertisers, shareholders, debt holders and the community-based programming currently enjoyed by the American public.

All will twist in the wind in a state of uncertainty while the FCC tries to deal with hurdles that may not be cleared in its reckless race to the finish line.

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* Given the anonymity which the FCC has allowed in behind-closed-door meetings and in other *ex parte* presentations in the "public" incentive auction proceeding, a pen name is used here as a matter of rhetorical balance. Googling "D.A. Selby" reveals a tip of the hat to the legal acumen of Erle Stanley Gardner, who occasionally used a pen name. For the prior still valid op-ed contribution by the author, [click to see RBR-TVBR from March 7, 2015](#).

Links used:

Paragraph 2 ...will the FCC “screw the pooch,” as the Mercury astronauts used to say?

http://www.slate.com/blogs/lexicon_valley/2014/01/14/screw_the_pooch_etymology_of_the_idiom_dates_back_to_nasa_and_the_military.html

Paragraph 6 Section 309(j)(1) of the Communications Act:

<https://www.law.cornell.edu/uscode/text/47/309>

Paragraph 8 Population/HHs in the top 30 DMAs:

<http://www.tvb.org/media/file/2015-2016-dma-ranks.pdf>

Paragraph 16 License case that went all the way to the Supremes:

https://en.m.wikipedia.org/wiki/NextWave_Wireless

Paragraph 16 The FCC’s failed headlong rush documented in the *LATimes*:

<http://articles.latimes.com/2003/jan/28/business/fi-nextwave28>

Concluding RBR link to D.A Selby’s first prescient piece:

<http://rbr.com/the-illusion-of-a-2016-incentive-auction/#grJPI6EASxDpreLj.99>